Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1042

PEOPLE OF THE STATE OF ILLINOIS EX REL. JOHN C. WATSON, DIRECTOR OF THE DEPARTMENT OF REGISTRATION AND EDUCATION, AND THE ILLINOIS STATE DENTAL SOCIETY,
Respondents,

vs.

ALAN SPINKA, INDIVIDUALLY AND DOING BUSINESS AS NORTH GRAND DENTAL LABORATORY AND B & S DENTAL LABORATORY,
Petitioners.

ALAN SPINKA, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,
Cross-Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. JOHN C. WATSON, DIRECTOR OF THE DEPARTMENT OF REGISTRATION AND EDUCATION, AND THE ILLINOIS STATE DENTAL SOCIETY,
Cross-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Respondents, People of the State of Illinois ex rel. John C. Watson, Director of the Department of Registration and Educa-

tion, and the Illinois State Dental Society, answer the Petition for a Writ of Certiorari to the Supreme Court of Illinois and respectfully submit that the Petition does not meet the jurisdictional requirements of Section 1257(3) of Title 28 of the United States Code, and, alternatively, that there is no substantial federal question involved which would justify this Court's review.

STATEMENT OF THE CASE.

This action was first brought by respondents to enjoin Alan Spinka from practicing dentistry without a license in the State of Illinois, and the trial court granted a permanent injunction enjoining Spinka from engaging in such activity. Respondents subsequently filed a Petition for Rule to Show Cause why Spinka should not be found guilty of contempt of court for having violated the injunction, and Spinka responded by filing an Affirmative Defense and Counterclaim on his own behalf and "on behalf of all others similarly situated." This pleading asserted that the Legislative Assembly of The Province of Ontario, Canada enacted the Denture Therapists Act of 1974, which provides a licensing procedure enabling persons to practice denture therapy and that, therefore, the Illinois courts should recognize the denture therapist as a member of a professional group independent of the dental profession and hold the Illinois Dental Practice Act unconstitutional on the ground that it arbitrarily and unreasonably deprives Spinka and all others similarly situated of their right to earn a living in their profession without due process of law.

After a full hearing on respondent's motion to strike and dismiss the counterclaim, the trial court granted the motion and also specifically recited that it had considered Spinka's constitutional issues and had found them not well taken. On Spinka's election not to contest the factual allegations in the Petition for Rule to Show Cause and supporting affidavits, the trial court found Spinka in contempt of court for having violated the injunction and entered a judgment against Spinka for costs and ten days' confinement in the Cook County jail.

Spinka appealed to the Illinois Appellate Court seeking a reversal of the trial court judgment on the ground that the Illinois Dental Practice Act (Ill. Rev. Stat. 1975, ch. 91, pars.

56-72), upon which the original injunction was based, is unconstitutional and void to the extent that it deprived Spinka and others similarly situated of their property and liberty without due process of law. The Appellate Court affirmed the trial court judgment, stating that the issue of the constitutionality of the Dental Practice Act was not properly before the trial court or the reviewing court because Illinois case law holds that an injunction, no matter how erroneous, must be obeyed until set aside. The Appellate Court did, however, go on to state that the constitutionality of the Dental Practice Act as a valid exercise of police power had been affirmed by both the Illinois Supreme Court and the Illinois Appellate Court.

Spinka then filed a Petition to Appeal as a Matter of Right to the Illinois Supreme Court, arguing that the Appellate Court had refused to consider the constitutionality of the Dental Practice Act and that such refusal—an alleged violation of his due process rights—raised a constitutional issue for the first time as a result of the action of the Appellate Court and, thus, was appealable to the Illinois Supreme Court as a matter of right. The Illinois Supreme Court denied the Petition to Appeal as a Matter of Right and this Petition for a Writ of Certiorari followed.

ARGUMENT.

I.

THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS DOES NOT MEET THE JURISDICTIONAL REQUIREMENTS OF SECTION 1257(3) OF TITLE 28 OF THE UNITED STATES CODE.

Section 1257(3) of Title 28 of the United States Code provides, in pertinent part, that this Court may review a final judgment of the Illinois Supreme Court by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States". Apparently, the thrust of Petitioner Spinka's argument is that the Illinois Supreme Court's denial of his Petition to Appeal as a Matter of Right from a constitutional issue which purportedly arose for the first time as a result of the action of the Illinois Appellate Court was a violation of his procedural rights without due process of law such that the requirements of Section 1257(3) would be satisfied.

This jurisdictional requirement is not met, however, because the Illinois Supreme Court's denial of the Petition to Appeal as a Matter of Right was not violative of any of Spinka's procedural rights. No constitutional issue arose for the first time as a result of the action of the Illinois Appellate Court, and, therefore, Spinka was not entitled to an appeal to the Illinois Supreme Court as a matter of right. Constitution of the State of Illinois, Article 6, Section 4(c).

Spinka's argument to the Appellate Court was that the contempt order was invalid because the injunction was based upon an allegedly unconstitutional statute. This argument was rejected by the Appellate Court on several grounds, one of which was

that it was an improperly presented collateral attack on the propriety of the original injunction. This holding is supported by Illinois case law which cites the general rule that any order made by a court in the proper exercise of its jurisdiction must be obeyed, even if it has been erroneously entered, until it is reversed or set aside in a direct proceeding for that purpose. *Holms* v. *Kammerman,* 10 Ill. App. 2d 450, 135 N. E. 2d 162 (1st Dist. 1956). This Court has held to the same effect in *United States* v. *United Mine Workers of America,* 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1947):

> . . . we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. In Howat v. Kansas, 258 U.S. 181, 190, 66 L.Ed. 550, 559, 42 S.Ct. 277 (1922) this Court said:
>
> > "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decisions are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." [330 U.S. at 293, 91 L.Ed. at 912.]

The injunction first entered against Spinka was not appealed. In fact, the injunction was entered pursuant to a Consent Decree of Injunction. Therefore, the only issue before the trial court on the contempt proceeding was whether an injunction had been previously entered and, if so, whether Spinka had violated that injunction. *People* v. *Spounias,* 20 Ill. App. 2d 184, 155 N. E. 2d 326 (3d Dist. 1959). The constitutionality of the statute upon which the injunction was based is not properly at issue.

Spinka here argues, however, that insofar as a case involving the punishment of a crime is concerned, the constitutionality of the statute authorizing the prosecution may be questioned at any stage of the proceedings. *People* v. *Sarelli,* 55 Ill. 2d 169, 302 N. E. 2d 317 (1973). The case at bar, though, does not involve the punishment of a crime but, rather, a petty offense. The case herein involves a contempt proceeding for the violation of an injunction, and the trial court advised Spinka prior to the hearing that it would not regard the purported contempt as a serious criminal contempt and that the penalty imposed, if any, would not exceed six months' confinement. In fact, the penalty imposed upon the finding of contempt was ten days' confinement, a penalty well within what this Court has determined proper for a petty offense. *Cheff* v. *Schnackenberg,* 384 U. S. 373, 16 L. Ed. 2d 629, 86 S. Ct. 1523 (1966). The Illinois Supreme Court has followed the *Cheff* opinion in *County of McLean* v. *Kickapoo Creek, Inc.,* 51 Ill. 2d 353, 282 N. E. 2d 720 (1972).

In any event, the *Sarelli* holding is not supportive of Spinka's position that a constitutional issue may be raised at any time. In *Sarelli,* the defendant was convicted of the unlawful sale of marijuana and on appeal, he questioned the sufficiency of the evidence, but not the constitutionality of the statute under which he was convicted. After the appellate court affirmed his conviction, the Illinois Supreme Court held unconstitutional the classification of marijuana as a narcotic drug. When the defendant filed a petition under the Illinois Post-Conviction Hearing Act asserting that he was convicted under an unconstitutional statute, the People objected on the ground that the defendant had waived the issue of the unconstitutionality of the statute because he had not raised it previously. Although the Illinois Supreme Court allowed the defendant's post-conviction petition to raise the constitutional issue for the first time, such holding was based upon the fact that the statute involved had

already been held unconstitutional in a separate proceeding. The *Sarelli* holding, in effect, allowed the retroactive application of a finding of unconstitutionality. The *Sarelli* holding does not allow a party, as Spinka here attempts, to challenge the constitutionality of a statute at any point in the proceedings when the statute involved is yet held valid.

Therefore, Spinka's attempt to raise the issue of the constitutionality of the Dental Practice Act in the Appellate Court was improper, and that court's action as concerns the constitutionality issue was not a violation of Spinka's due process rights and did not raise a further constitutional issue in that court for the first time. Thus, Spinka was not entitled to appeal to the Illinois Supreme Court as a matter of right, and that court's refusal of the Petition does not raise a constitutional issue as would form the basis for jurisdiction in this Court under Section 1257(3).

II.

PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED, AND NO SUBSTANTIAL FEDERAL QUESTION IS HERE INVOLVED WHICH WOULD JUSTIFY THIS COURT'S REVIEW.

Even if this Court's jurisdiction were properly invoked, there is no doubt but that Spinka's due process rights were not invaded. Although the constitutionality of the Dental Practice Act was not properly brought into issue during the contempt proceeding, both the trial and the appellate courts reviewed Spinka's constitutional argument and rejected it. The trial court's order specifically recited that it had considered Spinka's constitutional issues and had found them without merit, and the Appellate Court noted that the constitutionality of the Illinois Dental Practice Act had been affirmed by both the Illinois Appellate Court and the Illinois Supreme Court. *People ex rel.* v. *A. A. A. Dental Lab.*, 8 Ill. 2d 330, 134 N. E. 2d 285 (1956), appeal dismissed, 352 U. S. 863, 1 L. Ed. 2d 73, 77 S. Ct. 97

(1956), U. S. *rehrg. den.*, 352 U. S. 919; *People ex rel. Ill. State Dental Society* v. *Vinci*, 35 Ill. App. 3d 474, 342 N. E. 2d 206 (1st Dist. 1976). [Appendix, p. 7A, Petition for Writ of Certiorari.]

In fact, not only have the Illinois Appellate and Illinois Supreme Courts upheld the constitutionality of the Dental Practice Act as a valid exercise of the police power, but the federal district court sitting in the Northern District of Illinois has held the Illinois Supreme Court's finding of constitutionality binding as concerns the Illinois constitution and persuasive as concerns the federal constitution. *Duncan* v. *Ward*, 225 F. Supp. 195 (N. D. E. D. Ill. 1963).

Spinka was not denied due process of law because even if he were entitled to raise the issue of the constitutionality of the Dental Practice Act during the contempt proceeding, he actually had a hearing on such issue in both the trial and the appellate courts, and the decisions of those courts in rejecting the constitutional issue raised were in conformance with prior determinations of the Illinois Supreme and the Illinois Appellate Courts. Therefore, there is no substantial federal question which would justify a review by this Court.

CONCLUSION.

We submit that for the reasons stated above and in accordance with the authorities cited, the Petition for a Writ of Certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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Dated: January 25, 1979.